NOTES AND COMMENTS

BACKWARDS TO THE CAUTIONARY RULE: *S v Van der Ross* 2002 (2) SACR 362 (C)

The judgment of Thring J in *S v Van der Ross*[1] raises a number of ghosts in respect of the evaluation of the evidence of complainants in sexual offence cases. As noted by the court in *Van der Ross*, the Supreme Court of Appeal in the 1998 case of *S v Jackson*[2] very clearly held that the common law cautionary approach to complainants in sexual offence cases was irrational and had no place in our law.[3] The Supreme Court of Appeal also made it clear that evidence in a particular case might call for a cautionary approach and quoted, inter alia, the following portion of Lord Taylor CJ's dictum in *R v Makanjuola, R v Easton*:[4]

> In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross examining counsel.[5]

This qualification that, in some instances, a cautionary approach might still be justified led the South African Law Commission to conclude that the cautionary rule had not been abolished but merely reformulated and consequently the dangers of its prejudicial effects remained.[6] The iniquity of this particular cautionary rule has been the subject of many journal articles, many of which are reflected in the South African Law Commission's Discussion Paper[7] and in *S v Jackson*.[8] The Commission accordingly recommended in its final Report that the cautionary rule in sexual offences be expressly abolished in a new Sexual Offences Act.[9] Prior to *S v Van der Ross* it could be argued (and I confess that I was a proponent of this argument) that little could be served by abolishing a rule that was already abolished, and that Olivier JA's dictum merely required that the evaluation of the testimony of a complainant in a sexual

1 2002 (2) SACR 362 (C).
2 1998 (1) SACR 470 (SCA).
3 Ibid 476e-f.
4 [1995] 3 All ER 730 CA.
5 Ibid 733c-d. See also *S v M* 1999 (2) SACR 548 (SCA).
6 Discussion Paper 102: *Sexual Offences: Process and Procedure* Project 107 (2002) paras 31.2.4.5-31.2.4.10.
7 Ibid.
8 Note 2 above.
9 South African Law Commission, Project 107 *Sexual Offences Report* (December 2002) para 5.2.3.

offence case be placed on the same footing as any other witness. Unfortunately, *Van der Ross*' case suggests that the Law Commission's fears were not unfounded.

In *S v Van der Ross* the court considered an appeal against a conviction of rape and a twelve year sentence by a regional court. The court summarised the relevant facts as follows:[10] The complainant was a thirty year old woman who had lived with the appellant for three years prior to his arrest on the charge of rape. They had a two year old child and lived close to the appellant's parents. According to the appellant, on the relevant Friday evening he returned home drunk, ate his food and went to bed. The next day the complainant accused him of raping her and he was arrested. The complainant testified that the appellant had demanded sex after going to bed and that she had refused because he was inebriated. She said that she had an agreement with the appellant that they would not have sex when he was drunk. However, the appellant proceeded to undress her and force her to have non-consensual sexual intercourse with him at least six times in three different positions. On each occasion he ejaculated. The appellant had no recollection of having sex with the complainant.

Thring J noted that the complainant was a single witness in respect of two essential, but disputed, points, namely, the fact that there had been (i) sexual intercourse and (ii) that it had been non-consensual. The court noted that the magistrate in the court a quo had cautioned himself against the dangers inherent in the testimony of a single witness. The magistrate then came to the conclusion that whilst the appellant had lacked veracity the complainant was, beyond reasonable doubt, a truthful witness. The magistrate found the complainant's testimony to be clear and satisfactory and devoid of contradictions. The magistrate found no indication that the complainant might have had a motive to falsely implicate the appellant. Nevertheless, Thring J held that the magistrate had failed to sufficiently warn himself against the dangers in the complainant's testimony. Thring J then noted that the complainant was not only a single witness in relation to crucial aspects of the prosecution's case, but also that the charge was of a *sexual nature* and took place in a *domestic situation* and, consequently, the magistrate had made a mistake in only taking into account the single witness status of the complainant. Thring J summarised the court's interpretation of *S v Jackson* as follows: 'Myns insiens is al wat die uitspraak in *S v J* beteken dat daar nie noodwending in elke sodanige saak 'n algemene, onwrikbare versigtigheidsreel op die getuienis van 'n klaagster toegepas hoef to word nie'.[11]

10 Note 1 above 364.

11 Ibid 365h. Translation: 'In my view the judgment in *S v J* merely means that there is not necessarily, in a case of this nature, a general unyielding (fixed) cautionary rule that must be applied to the evidence of the complainant'.

The court then repeated the following extract from the judgement of Olivier JA: 'The evidence in a particular case may call for a cautionary . . . approach'.[12] However, it is clear from the judgment that for Thring J (Erasmus J concurring) it was the sexual nature of the case that provided the evidential basis for attracting a cautionary approach. The following passages from the judgment make it difficult to conclude otherwise:

> Die klaagster is nie alleenlik 'n enkel getuie wat betref die kern geskilpunte nie: haar klagte is van 'n seksuele aard, en het in 'n huishoudelike situasie ontstaan.[13]
>
> Dit is duidelik uit wat hy sê dat, alhoewel die landdros die getuienis van die klaagster met versigtigheid benader het bloot omdat haar getuienis op die twee kern geskilpunte alleen gestaan het, hy dit nie nodig geag het om nog meer versigtig te wees omdat haar klagte een van 'n seksuele aard was nie. In die omstandighede van hierdie saak dink ek dat die landdros in hierdie opsigte misgetas het.[14]
>
> Na my oordeel, roep hierdie saak luidkeels vir 'n benadering van die klaagster se getuienis wat dubbel versigtig is, eerstens omdat sy 'n enkel getuie is, en ook weens die aard van haar klagte.[15]

The fact that the charge is one of rape also seems sufficient to attract a cautionary approach in terms of Thring J's reasoning where he expresses the view that 'criminal courts should be encouraged to exercise extreme caution before they convict people on serious charges, such as rape, especially with the introduction of prescribed sentences by the Legislature'.[16] This would seem to be at odds with the reasoning in *Jackson* in which the court notes the inequity in imposing a higher standard of proof in sexual offence case through the application of the cautionary rule.[17] It is trite that in all criminal cases the standard is one of proof beyond reasonable doubt[18] and that this component of the presumption of innocence, together with the allocation of the burden of proof, is regarded in many well established democracies as being sufficient protection against the dangers of a wrong conviction.

Having made these general comments, Thring J then dealt with the specific circumstances of the case and gave the following reasons for adopting a 'double caution':

1. A long history of domestic squabbling and friction which included verbal abuse by both parties as well as mutual accusations of

12 Ibid.

13 Ibid 364h. Translation: 'The complainant is not only a single witness in respect of the core issues: her complaint is of a sexual nature, and stemmed from a domestic situation'.

14 Ibid 365d. Translation: 'Even though the magistrate had approached the complainant's evidence with caution because her evidence stood alone on two core issues, it is also clear from what he says that he did not consider it necessary that he had to be extra cautious because her complaint was of a sexual nature'.

15 Ibid 365i. Translation: 'In my view this case cries out for a double cautious approach to the complainant's evidence: not only because she is a single witness, but also because of the nature of the complaint'.

16 Ibid headnote. See also 365g.

17 Note 2 above, 475j.

18 *S v Sinkanka* 1963 (2) SA 531 (A).

unfaithfulness. The appellant also testified that the complainant frequently threatened him when he was drunk that he 'sal sien wat hom sal oorkom'.[19] Thring J held that from experience it was known that such an atmosphere of continual family friction was fertile ground for false accusations of all kinds. The court noted that in these cases the court frequently had to hear long and bitter but largely irrelevant testimony of the intimate details of a couple's private life. This, Thring J noted, was the price to be paid for legislating that a man could be guilty of marital rape.[20]

2. The complainant was examined by a district surgeon at 7 pm the evening after the alleged rape. The district surgeon found no injuries and no indications that the complainant had had sexual intercourse. However, the court noted that this evidence was neutral in that the district surgeon testified that the complainant was menstruating when he examined her. However, the court noted that this meant that there was no medical corroboration of the complainant's version and noted further that the complainant had also testified that she had no visible injuries as a result of the repeated rapes.
3. The court held 'met alle verskuldigde respek aan die manhaftigheid (sic) van die appellant'[21] that the complainant's testimony that the appellant had had full sexual intercourse with her six times in less than an hour was farfetched. The court then alluded to a scene in Macbeth to highlight this point: 'Die opmerking van die hekwag in *Macbeth* is te goed bekend om dit nodig te maak om dit hier te herhaal'.[22] This is a reference to a scene of comic relief in which a porter makes a comment to the effect that alchohol provokes desire but detracts from the ability to fulfill such desire.
4. The court also noted that it was common cause that the appellant was significantly inebriated on the night of the alleged rape, and that the complainant had testified that the appellant went to sleep after the alleged rape and slept until midday the following day. However, the complainant made no attempt to leave the appellant during the night and complained to no one until approximately 11 o'clock the following morning when she made a report to the appellant's mother. The appellant's mother testified that the complainant told her that her son had been drunk and that she was unhappy that he wanted to have intercourse with her when drunk and that he had told her to lie on her back and then on her side. The appellant's mother in response to questioning also said that the complainant looked normal and had no visible injuries when she made the report.

19 Note I above 366c-d. Translation: 'will see what will happen to him'.
20 Ibid 366c-d.
21 Ibid 366g-h. Translation: 'with all due respect to the courage/bravery of the appellant'.
22 Ibid 366g. Translation: 'The remark of the gatekeeper in *Macbeth* is too well-known to require repetition in this judgment'.

Thring J concluded that the complainant's inactivity and silence coupled with her normal appearance and the contents of her report to the appellant's mother and the absence of any medical corroboration of the complainant's story made her version of events suspicious.

Although Thring J agreed with the magistrate's finding that the appellant was a poor witness, he held that this did not cure the serious weaknesses in the complainant's testimony. Accordingly the magistrate had erred in merely applying the cautionary rule applicable to single witnesses in that he should have approached the evidence of the complainant with a double caution ('dubbele versigtigheid'). He held that if the magistrate had taken the appropriate cautionary approach, he, in all likelihood, would have reached a different conclusion. Consequently the appeal succeeded and the conviction and sentence were set aside.

The emphasis placed by Thring J on the sexual nature of the offence makes it difficult to refute the argument that *Jackson* does little else than reformulate the cautionary rule. The alternative is that Thring J was wrong in his interpretation of *Jackson*. If *Jackson* were to be read as simply permitting the sexual nature of the offence to provide a sufficient 'evidential basis' for applying a cautionary approach, its ruling that the cautionary rule has no place in our law is meaningless. In defence of Thring J, it might be argued that, although great emphasis was placed on the sexual nature of the offence, it was the specific circumstances of the case that called for caution other than that applicable to a single witness. It then becomes necessary to re-examine the specific circumstances identified by Thring J.

The first point was that there was a history of domestic squabbling. The court's observations in this regard are summarised above. Other than the court's general observation that experience shows that domestic friction provides a fertile ground for false accusations, it is difficult to ascertain how the evidence supports a specific motive for laying a false charge. The complainant testified that the couple had an agreement that they would not have sexual intercourse when the appellant was drunk – nowhere in the judgement is this aspect of the complainant's evidence questioned. (This agreement is arguably echoed in the complainant's report to the appellant's mother). The most apparent motive for laying a charge would be to prevent the appellant demanding sexual intercourse when drunk. This would be consistent with the complainant's version of events. Marital/partner rape is arguably less likely to occur when the parties have a relationship free from domestic friction – if the existence of domestic friction on its own provides an evidential basis for taking a cautionary approach it would seem inevitable that a cautionary approach will always be applied to sexual assault in a domestic setting. The rationality of such an approach is far from obvious and will certainly detract from the long awaited protection afforded women by the Domestic Violence Act 116 of 1998.

The next specific circumstance was the absence of visible injuries. The judgment does not allow us to discern whether there was any judicial reflection on the many possible reasons as to why there would be no visible injuries other than the fact that the complainant was menstruating at the time of the medical examination. Although Thring J notes that the medical evidence is neutral,[23] it is clear it is a factor that the court takes into account in its conclusion that the complainant's version lacks veracity.[24] Given the neutrality of the medical evidence it is difficult to see how it could provide grounds for invoking a cautionary approach.

Another specific factor taken into account by the court was the complainant's account of the sexual intercourse itself. It is unclear precisely what aspect the court found farfetched: the fact that the accused could sustain an erection that would permit him to penetrate the accused six times or the number of times the appellant was alleged to have ejaculated? It is also difficult to ascertain the source of the court's knowledge in regard to these matters. Judicial notice cannot be based on a judge's personal experience so this possibility must be excluded, Shakespeare also cannot be regarded as a judicial authority (or any other) on such matters. Unfortunately the judgment does not reflect whether any evidence was led in this regard and consequently it is very difficult to ascertain whether this is indeed a reasonable basis for applying a double cautionary rule. If indeed it is simply a matter of common sense then the danger that a single witness may exaggerate is surely something that can be adequately guarded against by applying the cautionary rule applicable to single witnesses.

The fourth factor taken into account by court was the complainant's failure to leave the accused once he had fallen asleep and her failure to make a report before 11 in the morning following the alleged rape coupled with her normal appearance. (The prejudicial effect and irrationality of the exception to the rule that prohibits previous consistent statements on grounds of irrelevancy have been discussed extensively elsewhere and are not repeated here.[25]) The court does not reflect in its judgment any consideration of the plethora of reasonable explanations as to why the complainant acted as she did. For example, the appellant no longer posed a danger, the possibility that the complainant might have taken time to reflect on the consequences of laying a charge bearing in mind that the appellant was the father of their young child, the absence of a sympathetic person to report to ('mother-in-laws' stereotypically fall out of this category). It is also difficult to ascertain from the extract of the record reflected in the judgment as to what inconsistencies the court

23 Ibid 366f.
24 Ibid 367c.
25 See for example the South African Law Commission's Discussion Paper (note 6 above).

found in the complainant's report to the appellant's mother and the complainant's testimony. Again the court notes that the complainant showed no visible injuries and appeared normal when making the report to the appellant's mother. There are two issues here. Firstly, if demeanour when making a report of a sexual assault is sufficient on its own to provide an evidential basis for adopting a double cautionary approach, then it will be extremely easy to resurrect the irrational cautionary rule referred to in *Jackson*. The second and related issue is what is an appropriate demeanour in such circumstances? It is submitted that if normality is to be regarded as an indicator of mendacity then we apparently have not progressed beyond the 'hue and cry' rule recorded by Bracton in the 13th century which required the complainant

> to go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done her to men of good repute, the blood and clothing stained with blood, and her torn garments.[26]

Of course this is hyperbole, nevertheless the judgment in *Van der Ross,* even if found to be based on an incorrect interpretation of *Jackson*, certainly lends credence to the Law Commission's submission that legislation is required to expressly abolish the cautionary rule and that the rules pertaining to previous consistent statements need to be revised.[27] It also clearly indicates that if the proposed Sexual Offences legislation is going to meet its objectives, it needs to be accompanied by judicial training at all levels.

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26 H de Bracton *On the Law and Customs of England* translated by FE Thorne (1968).
27 *Sexual Offences Report* (note 9 above) paras 5.1 5.2.3; 5.3.3.